

<u>Previously Applicable Law</u>	<u>Putative Code Section (HB 173)</u>	<u>Comments</u>
	§ 13-8-2	
<p>(a) A contract which is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:</p> <p>(1) Contracts tending to corrupt legislation or the judiciary;</p> <p>(2) Contracts in general restraint of trade, as distinguished from contracts in partial restraint of trade as provided for in Code Section § 13-8-2.1 [held unconstitutional];</p> <p>(3) Contracts to evade or oppose the revenue laws of another country;</p> <p>(4) Wagering contracts; or</p> <p>(5) Contracts of maintenance or champerty.</p>	<p>a) A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:</p> <p>(1) Contracts tending to corrupt legislation or the judiciary;</p> <p>(2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter;</p> <p>(3) Contracts to evade or oppose the revenue laws of another country;</p> <p>(4) Wagering contracts; or</p> <p>(5) Contracts of maintenance or champerty.</p>	<p>Changes code section on unenforceable contracts to accommodate new Act.</p>
	§ 13-8-50. <i>[Legislative findings]</i>	
	<p>The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses</p>	<p>Goals:</p> <ol style="list-style-type: none"> 1. to protect businesses 2. predictability

	<p>within the state.</p> <p>Further, the General Assembly desires to provide statutory guidance so that all parties to such agreements may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions.</p>	
	§ 13-8-51.	
	As used in this article, the term:	
	<p>(1) 'Affiliate' means:</p> <p>(A) A person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with another person or entity;</p> <p>(B) Any entity of which a person is an officer, director, or partner or holds an equity interest or ownership position that accounts for 25 percent or more of the voting rights or profit interest of such entity;</p> <p>(C) Any trust or other estate in which the person or entity has a beneficial interest of 25 percent or more or as to which such person or entity serves as trustee or in a similar fiduciary capacity; or</p> <p>(D) The spouse, lineal ancestors, lineal descendants, and siblings of the person, as well as each of their spouses.</p>	

	<p>(2) 'Business' means any line of trade or business conducted by the seller or employer, as such terms are defined in this Code section.</p>	<p>Treats seller and employer business the same.</p>
	<p>(3) 'Confidential information' means data and information:</p> <p>(A) Relating to the business of the employer, regardless of whether the data or information constitutes a trade secret as that term is defined in Article 1 of Chapter 10 of Title 10;</p> <p>(B) Disclosed to the employee or of which the employee became aware of as a consequence of the employee's relationship with the employer;</p> <p>(C) Having value to the employer;</p> <p>(D) Not generally known to competitors of the employer; and</p> <p>(E) Which includes trade secrets, methods of operation, names of customers, price lists, financial information and projections, route books, personnel data, and similar information;</p> <p>provided, however, that such term shall not mean data or information (A) which has been voluntarily disclosed to the public by the employer, except where such public disclosure has been made by the employee without authorization from the employer; (B) which has been</p>	<p>Confidential information includes something broader than trade secrets, but still less than all employer information.</p> <p>"Having value to the employer" is potentially vague.</p>

	<p>independently developed and disclosed by others; or (C) which has otherwise entered the public domain through lawful means.</p>	
	<p>(4) 'Controlling interest' means any equity interest or ownership participation held by a person or entity with respect to a business that accounts for 25 percent or more of the voting rights or profit interest of the business prior to the sale, alone or in combination with the interest or participation held by affiliates of such person or entity.</p>	
	<p>(5) 'Employee' means:</p> <p>(A) An executive employee;</p> <p>(B) Research and development personnel or other persons or entities of an employer, including, without limitation, independent contractors, in possession of confidential information that is important to the business of the employer;</p> <p>(C) Any other person or entity, including an independent contractor, in possession of selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information who or that has obtained such skills, learning, abilities, contacts, or information by reason of having worked for an employer;</p> <p>or</p> <p>(D) A franchisee, distributor, lessee, licensee, or party</p>	<p>Employee includes executives and persons with specialized skills, contacts or confidential information; but it also includes independent contractors, and it includes franchisees, lessees, and the like.</p>

	<p>to a partnership agreement or a sales agent, broker, or representative in connection with franchise, distributorship, lease, license, or partnership agreements.</p> <p>Such term shall not include any employee who lacks selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information.</p>	
	<p>(6) 'Employer' means any corporation, partnership, proprietorship, or other business organization, whether for profit or not for profit, including, without limitation, any successor in interest to such an entity, who or that conducts business or any person or entity who or that directly or indirectly owns an equity interest or ownership participation in such an entity accounting for 25 percent or more of the voting rights or profit interest of such entity. Such term also means the buyer or seller of a business organization.</p>	<p>Employers are</p> <ul style="list-style-type: none"> --business organizations (including nonprofits); --persons or organizations with a 25% interest in an business organization; and -- both buyers and sellers of business organizations <p>(Not defined with reference to actually "employing" anyone.)</p>
	<p>(7) 'Executive employee' means a member of the board of directors, an officer, a key employee, a manager, or a supervisor of an employer.</p>	<p>Defines "executive employee" to include, among other things, board members and "key employees" who are neither officers nor managers.</p> <p>"Supervisor of an employer" is potentially ambiguous</p>
	<p>(8) 'Key employee' means an employee who, by reason</p>	<p>Defines key employee as either a</p>

	<p>of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer, has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson or has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer.</p> <p>Such term also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.</p>	<p>very public/high profile person, or someone with specialized skills or information. (subjective definition).</p> <p>Also potentially ambiguous as to whether the "employer's investment" requirement is required for each category (public representative, customer influence, or planning).</p>
	<p>(9) 'Legitimate business interest' includes, but is not limited to:</p> <p>(A) Trade secrets, as defined by Code Section 10-1-761, et seq.;</p> <p>(B) Valuable confidential information that otherwise does not qualify as a trade secret;</p> <p>(C) Substantial relationships with specific prospective</p>	<p>Lists the available interests that a party seeking to enforce a restrictive covenant will have to plead and prove (see § 13-8-55).</p> <p>Subjective and very broad, esp. as to (C) and (D).</p>

	<p>or existing customers, patients, vendors, or clients;</p> <p>(D) Customer, patient, or client good will associated with:</p> <p>(i) An ongoing business, commercial, or professional practice, including, but not limited to, by way of trade name, trademark, service mark, or trade dress;</p> <p>(ii) A specific geographic location; or</p> <p>(iii) A specific marketing or trade area; and</p> <p>(E) Extraordinary or specialized training.</p>	
	<p>(10) 'Material contact' means the contact between an employee and each customer or potential customer:</p> <p>(A) With whom or which the employee dealt on behalf of the employer;</p> <p>(B) Whose dealings with the employer were coordinated or supervised by the employee;</p> <p>(C) About whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer; or</p> <p>(D) Who receives products or services authorized by the employer, the sale or provision of which results or resulted in compensation, commissions, or earnings for the employee within two years prior to the date of the employee's termination.</p>	

<p>When a portion of a covenant not to compete which is a part of a sale of a business interest is found to be unreasonable, the court has tended nevertheless to uphold the remaining portions of the covenant by “blue penciling” or severing the overly broad restrictions. On the other hand, the court has found covenants not to compete which are part of a contract of employment to be nonseverable and has held that overbreadth of one portion of the covenant so taints the entire covenant as to make it unenforceable.</p> <p><i>Watson v. Waffle House, Inc.</i>, 253 Ga. 671, 672 (1985)</p>	<p>(11) 'Modification' means the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include:</p> <p>(A) Severing or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and</p> <p>(B) Enforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.</p>	<p>Definition of modification, to set up blue-penciling provisions.</p> <p>Potentially ambiguous as to whether it is intended to be limited to striking overly broad provisions and enforcing what remains, or allows modification of terms.</p>
	<p>(12) 'Modify' means to make, to cause, or otherwise to bring about a modification.</p>	
	<p>(13) 'Products or services' means anything of commercial value, including, without limitation, goods; personal, real, or intangible property; services; financial products; business opportunities or assistance; or any other object or aspect of business or the conduct thereof.</p>	
	<p>(15) 'Restrictive covenant' means an agreement between two or more parties that exists to protect the first party's or parties' interest in property, confidential information, customer good will, business relationships, employees, or any other economic advantages that the second party has obtained for the benefit of the first party or parties, to which the second party has gained access in the course of his or her relationship with the</p>	<p>Broad definition of restrictive covenant, beyond employment and sales agreements – it is any agreement designed to protect one party's business interests that the second party has obtained for the benefit of or during the course of the parties' relationship, or acquired in a sale.</p>

	<p>first party or parties, or which the first party or parties has acquired from the second party or parties as the result of a sale. Such restrictive covenants may exist within or ancillary to contracts between or among employers and employees, distributors and manufacturers, lessors and lessees, partnerships and partners, employers and independent contractors, franchisors and franchisees, and sellers and purchasers of a business or commercial enterprise and any two or more employers. A restrictive covenant shall not include covenants appurtenant to real property.</p>	
	<p>(16) 'Sale' means any sale or transfer of the good will or substantially all of the assets of a business or any sale or transfer of a controlling interest in a business, whether by sale, exchange, redemption, merger, or otherwise.</p>	
	<p>(17) 'Seller' means any person or entity, including any successor-in-interest to such an entity, that is:</p> <ul style="list-style-type: none"> (A) An owner of a controlling interest; (B) An executive employee of the business who receives, at a minimum, consideration in connection with a sale; or (C) An affiliate of a person or entity described in subparagraph (A) of this paragraph; provided, however, that each sale involving a restrictive covenant shall be binding only on the person or entity entering into such covenant, its successors-in-interest, and, if so specified in 	

	the covenant, any entity that directly or indirectly through one or more affiliates is controlled by or is under common control of such person or entity.	
	(18) ' Termination ' means the termination of an employee's engagement with an employer, whether with or without cause, upon the initiative of either party.	
	(19) ' Trade dress ' means the distinctive packaging or design of a product that promotes the product and distinguishes it from other products in the marketplace.	
	§ 13-8-52.	
	<p>(a) The provisions of this article shall be applicable only to contracts and agreements between or among:</p> <p>(1) Employers and employees, as such terms are defined in Code Section § 13-8-51;</p> <p>(2) Distributors and manufacturers;</p> <p>(3) Lessors and lessees;</p> <p>(4) Partnerships and partners;</p> <p>(5) Franchisors and franchisees;</p> <p>(6) Sellers and purchasers of a business or commercial enterprise; and</p> <p>(7) Two or more employers.</p> <p>(b) The provisions of this article shall not apply to any</p>	<p>This statute includes a number of business relationships, including "among... two or more employers."</p> <p>Limits the universe of affected</p>

	contract or agreement not described in subsection (a) of this Code section.	restricted covenants to those listed.
	§ 13-8-53.	
<p>A partial restraint has been upheld “if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. ... A three-element test of duration, territorial coverage, and scope of activity has evolved as a ‘helpful tool’ in examining the reasonableness of the particular factual setting to which it is applied.”</p> <p><i>W.R. Grace & Co. v. Mouyal</i>, 262 Ga. 464, 465 (1992).</p>	<p><i>[Seller, employee, or business relationship -- noncompetition]</i></p> <p>(a) Notwithstanding any other provision of this chapter, enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted. However, enforcement of contracts that restrict competition after the term of employment, as distinguished from a customer nonsolicitation provision, as described in subsection (b) of Code Section § 13-8-53, or a nondisclosure of confidential information provision, as described in subsection (e) of Code Section § 13-8-53, shall not be permitted against any employee who does not, in the course of his or her employment:</p> <p>(1) Customarily and regularly solicit for the employer customers or prospective customers;</p> <p>(2) Customarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;</p> <p>(3) Perform the following duties:</p>	<p>Creates single standard for enforceability of <i>noncompete</i> agreements regardless of relationship (seller, employee or other).</p> <p>Must be “reasonable” as to time, territory and scope, regardless of relationship.</p> <p>Postemployment noncompete agreements are not permitted against employees who are not either involved in sales or management/supervision.</p>

	<p>(A) Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;</p> <p>(B) Customarily and regularly direct the work of two or more other employees; and</p> <p>(C) Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees; or</p> <p>(4) Perform the duties of a key employee or of a professional.</p>	
	<p><i>[Employee post-termination nonsolicit agreements]</i></p>	
<p>It is an unreasonable and overbroad protection of the employer's interest to restrict a former employee from post-employment solicitation in a geographic area where the employer had no business interest. ... A restriction relating to the area in which the employer does business is generally unenforceable due to overbreadth, unless the employer can show a legitimate business interest that will be protected by such an expansive geographic description. A restriction relating to the area where the employee did business on behalf of the employer has been enforced as a legitimate protection of the employer's interest, but the prohibition against post-employment solicitation of any customer of the employer located in a specific geographic area is an unreasonable and overbroad attempt to protect the employer's interest in preventing the employee from exploiting the personal relationship the employee has enjoyed with the</p>	<p>(b) Notwithstanding any other provision of this chapter, an employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from soliciting, or attempting to solicit, directly or by assisting others, any business from any of such employer's customers, including actively seeking prospective customers, with whom the employee had material contact during his or her employment for purposes of providing products or services that are competitive with those provided by the employer's business.</p>	<p>Consistent with <i>W.R. Grace and Palmer & Cay</i>, postemployment nonsolicit agreements are acceptable as to only those customers with whom the employee worked on behalf of the employer.</p> <p>In light of the limitation based on</p>

<p>employer's customers.</p> <p><i>W.R. Grace</i>, 262 Ga. at 466-67.</p> <p>Previously, this Court has upheld such covenants prohibiting the post-termination solicitation of a former employer's customers for a reasonable period, without regard to when the former employee may have had contact with those customers.</p> <p><i>Palmer & Cay v. Lockton Cos.</i>, 280 Ga. 479, 480 (2006).</p> <p>This provision would prohibit Singer from accepting employment from a client of HAW who comes to him, without any prior solicitation on his part, and requests that he be their accountant. This provision prohibits more than the active solicitation or diversion of clients, and we find that it constitutes an unreasonable restraint of trade as it overprotects HAW's interests and unreasonably impacts on Singer and on the public's ability to choose the professional services it prefers.</p> <p><i>Singer v. Habif, Arogeti & Wynne, P.C.</i>, 250 Ga. 376, 377 (1982).</p>	<p>No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the restraint to be enforceable.</p> <p>Any reference to a prohibition against 'soliciting or attempting to solicit business from customers' or similar language shall be adequate for such purpose and narrowly construed to apply only to: (1) such of the employer's customers, including actively sought prospective customers, with whom the employee had material contact; and (2) products and services that are competitive with those provided by the employer's business.</p>	<p>employee's customers, geographic and scope limitations are not required for a postemployment nonsolicit.</p> <p>Creates a standard phrase which is deemed enforceable, and when used, will be interpreted to apply only to actual or prospective customers, and the same product/service area.</p>
	<p><i>[Standards for definition of prohibited activities, competitive products or services, or geographic areas]</i></p>	
<p>In the foregoing cases, restrictive covenants in which the employee was forbidden from engaging in any business or activity competitive with the business of the employer were struck down on the ground that the description of the prohibited activity was too indefinite to be enforced.</p> <p><i>Uni-Worth Enters. v. Wilson</i>, 244 Ga. 636, 639 (1979).</p> <p>A non-competition covenant which prohibits an employee from working for a competitor in any capacity, that is, a covenant which fails to specify with particularity the activities which the employee is prohibited from</p>	<p>(c)(1) Activities, products, or services that are competitive with the activities, products, or services of an employer shall include activities, products, or services that are the same as or similar to the activities, products, or services of the employer.</p> <p>Whenever a description of activities, products, and services, or geographic areas, is required by this Code section, any description that provides fair notice of the</p>	<p>Provides standards regarding definition of activities, products or services contained in covenant, superseding several prior cases regarding indefiniteness. Such a definition:</p> <p>--applies to same or similar activities/products or services as</p>

<p>performing, is too broad and indefinite to be enforceable.</p> <p><i>Nat'l Teen-Ager Co. v. Scarborough</i>, 254 Ga. 467, 469 (1985).</p> <p>This court has previously held that a territorial restriction which cannot be determined until the date of the employee's termination is too indefinite to be enforced.</p> <p><i>Koger Props., Inc. v. Adams-Cates Co.</i>, 247 Ga. 68, 68 (1981).</p>	<p>maximum reasonable scope of the restraint shall satisfy such requirement, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters.</p> <p>In case of a postemployment covenant entered into prior to termination, any good faith estimate of the activities, products, and services, or geographic areas, that may be applicable at the time of termination shall also satisfy such requirement, even if such estimate is capable of including or ultimately proves to include extraneous activities, products, and services, or geographic areas.</p> <p>The postemployment covenant shall be construed ultimately to cover only so much of such estimate as relates to the activities actually conducted, the products and services actually offered, or the geographic areas actually involved within a reasonable period of time prior to termination.</p>	<p>those offered by employer whenever it speaks of items "competitive with" employer's</p> <p>--may be overbroad so long as it "provides fair notice" of the "maximum reasonable scope" (however, the statute does not eliminate the holding that an employee cannot be prohibited from working for a competitor in any capacity).</p> <p>--for postemployment covenants entered into before termination, it need only be a "good faith estimate" of scope – however it will be construed as limited to what was actually provided and where (supersedes <i>Koger</i>).</p>
<p>Even under the strict scrutiny standard, noncompete covenants restricting an employee from rendering the same or substantially similar services he or she rendered at the former employer are generally reasonable.</p> <p><i>Habif, Arogeti & Wynne, P.C. v. Baggett</i>, 231 Ga. App. 289, 294 (1998).</p> <p>This court has previously held that a territorial restriction which cannot be determined until the date of the</p>	<p>(2) Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase 'of the type conducted, authorized, offered, or provided within two years prior to termination' or similar language containing the same or a lesser time period.</p>	<p>Creates standard enforceable phrases to define scope based on activities, products and services offered by employee within two years prior to time of termination, and to define geographic territory based on where the employee was</p>

<p>employee's termination is too indefinite to be enforced.</p> <p><i>Koger Props.. v. Adams-Cates Co.</i>, 247 Ga. 68, 68 (1981).</p> <p><i>See also W.R. Grace & Co. v. Mouyal</i>, 262 Ga. 464, 465 (1992) (<i>supra</i>)</p>	<p>The phrase 'the territory where the employee is working at the time of termination' or similar language shall be considered sufficient as a description of geographic areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination.</p>	<p>working at the time of termination.</p> <p>Adopts the preferred employee-centered (rather than employer-centered) scope definition (<i>see W.R. Grace</i>).</p>
<p>When a portion of a covenant not to compete which is a part of a sale of a business interest is found to be unreasonable, the court has tended nevertheless to uphold the remaining portions of the covenant by “blue penciling” or severing the overly broad restrictions. On the other hand, the court has found covenants not to compete which are part of a contract of employment to be nonseverable and has held that overbreadth of one portion of the covenant so taints the entire covenant as to make it unenforceable.</p> <p><i>Watson v. Waffle House, Inc.</i>, 253 Ga. 671, 672 (1985).</p>	<p>[Void for noncompliance unless modified]</p> <p>(d) Any restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided, however, that a court may modify a covenant that is otherwise void and unenforceable as long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties.</p>	<p>Restrictive covenant not compliant with this article is void, but may be modified.</p> <p>Modification cannot render the covenant more restrictive on an employee. (Does this apply to anything other than employment agreements?)</p>
<p>Contrary to the holding of the trial court, this [10-year] non-disclosure restrictive covenant, which is strictly limited to appellant's “trade secrets” and “ confidential business information,” is not unreasonable.</p> <p><i>American Software USA, Inc. v. Moore</i>, 264 Ga. 480, 483 (1994).</p> <p>Restriction 3 is a nondisclosure clause, and its</p>	<p>[Nondisclosure agreements]</p> <p>(e) Nothing in this article shall be construed to limit the period of time for which a party may agree to maintain information as confidential or as a trade secret, or to limit the geographic area within which such information must be kept confidential or as a trade secret, for so long</p>	<p>No time limit on nondisclosure agreements, so long as the information remains confidential or a trade secret.</p>

<p>reasonableness turns on the duration and the nature of the business interests Atlanta Bread Company seeks to protect. A nondisclosure clause with no time limitation, as here, is unenforceable as to information that is not a trade secret. Restriction 3, therefore, is enforceable only with respect to information meeting the definition of a trade secret.</p> <p><i>Atlanta Bread Co. Int'l, Inc. v. Lupton-Smith</i>, 292 Ga. App. 14, 20 (2008).</p>	<p>as the information or material remains confidential or a trade secret, as applicable.</p>	
	<p>§ 13-8-54. [Construction/Modification]</p>	
<p>If there is ambiguity, the court will apply the rules of contract construction in an attempt to resolve it. If application of those rules does not resolve the ambiguity, the contract's meaning and the contracting parties' intentions are questions left to the trier of fact.</p> <p>...</p> <p>A noncompete provision must balance “the employee's right to earn a living and his ability to determine with certainty the prohibited territory” with “the employer's interest in customer relationships created or furthered by its former employee on its behalf and its right to protect itself from the former employee's possible unfair appropriation of contacts developed while working for the employer.”</p> <p><i>Azzouz v. Prime Pediatrics, P.C.</i> 296 Ga. App. 602, 606 (2009).</p> <p>When a portion of a covenant not to compete which is a part of a sale of a business interest is found to be unreasonable, the court has tended nevertheless to uphold the remaining portions of the covenant by “blue penciling” or severing the overly broad restrictions. On the other hand, the court has found covenants not to compete which are part of a contract of employment to be nonseverable and has held that overbreadth of one portion of the covenant so taints the entire covenant as to make it</p>	<p>(a) A court shall construe a restrictive covenant to comport with the reasonable intent and expectations of the parties to the covenant and in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement.</p> <p>(b) In any action concerning enforcement of a restrictive covenant, a court shall not enforce a restrictive covenant unless it is in compliance with the provisions of Code Section § 13-8-53; provided, however, that if a court finds that a contractually specified restraint does not comply with the provisions of Code Section § 13-8-53, then the court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible.</p>	<p>To construe covenant, court must discern intent and expectations of the parties, and to protect the identified business interests (see § 13-8-55).</p> <p>Similar to § 13-8-53(d), covenant must comply with § 13-8-53 to be enforced, but if it does not comply, court may modify it to accomplish that result. Modification must be minimum necessary to protect the identified business interests, and still accomplish intent of the parties “to the extent possible.”</p>

<p>unenforceable.</p> <p><i>Watson v. Waffle House, Inc.</i>, 253 Ga. 671, 672 (1985).</p>		
<p>A partial restraint has been upheld “if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.”</p> <p><i>W.R. Grace & Co. v. Mouyal</i>, 262 Ga. 464, 465 (1992).</p>	<p>§ 13-8-55. [Burdens of proof]</p> <p>The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. If a person seeking enforcement of the restrictive covenant establishes by prima-facie evidence that the restraint is in compliance with the provisions of Code Section § 13-8-53, then any person opposing enforcement has the burden of establishing that the contractually specified restraint does not comply with such requirements or that such covenant is unreasonable.</p>	<p>Person seeking enforcement must <i>plead and</i> prove one or more of the business interests (identified above in definition). No express requirement of showing valuable consideration.</p> <p>Person seeking enforcement must show prima facie case that restraint complies with § 13-8-53; then, defendant must show either that it does not comply, or that it is (otherwise) unreasonable.</p>
	<p>§ 13-8-56. [Presumptions of reasonableness – time, territory and scope – during relationship]</p>	
<p>Following this precedent, we decline to enforce a franchise agreement restrictive covenant, even an in-term covenant, restraining trade unless that restrictive covenant meets the reasonableness standards promulgated in Georgia.</p> <p><i>Atlanta Bread Co. Int’l, Inc. v. Lipton-Smith</i>, 292 Ga. App. 14, 18 (2008).</p> <p>A covenant not to compete contained in the sale of a</p>	<p>In determining the reasonableness of a restrictive covenant that limits or restricts competition during the course of an employment or business relationship, the court shall make the following presumptions:</p> <p>(1) A time period equal to or measured by duration of the parties' business or commercial relationship is</p>	<p>Creates presumptions of reasonableness (on time, territory and scope) as to restrictive covenants that operate during the course of an employment or business relationship. (But, expressly does not <i>require</i> such limits in order</p>

<p>business, which restriction is within a reasonable space of territory, need not be limited as to time. The restriction in this case would prohibit appellees from competing in any state anywhere in the United States in which a franchise had been granted under the distributorship agreement. This provision of the covenant is overly broad and uncertain, rendering the entire covenant void on public policy grounds.</p> <p>We find the provision in question is also unreasonable as to the nature of the business activities proscribed in that the publication sought to be restricted is not unique, nor is it a national publication such that it would require broad territorial protection. Therefore, the restrictive covenant is unreasonable as to the nature of the business activities proscribed.</p> <p><i>Barrett-Walls, Inc. v. T.V. Venture, Inc.</i>, 242 Ga. 816, 819 (1979).</p>	<p>reasonable;</p> <p>(2) A geographic territory which includes the areas in which the employer does business at any time during the parties' commercial relationship, even if not known at the time of entry into the restrictive covenant, is reasonable provided that:</p> <p>(A) The total distance encompassed by the provisions of the covenant also is reasonable;</p> <p>(B) The agreement contains a list of particular competitors as prohibited employers for a limited period of time after the term of employment or a commercial or business relationship; or</p> <p>(C) Both subparagraphs (A) and (B) of this paragraph;</p> <p>(3) The scope of competition restricted is measured by the business of the employer or other person or entity in whose favor the restrictive covenant is given; provided, however, that a court shall not refuse to enforce the provisions of a restrictive covenant because the person seeking enforcement establishes evidence that a restrictive covenant has been violated but has not proven that the covenant has been violated as to the entire scope of the prohibited activities of the person seeking enforcement or as to the entire geographic area of the covenant; and</p>	<p>to be reasonable.)</p> <p>-- time equal to duration of parties' (ongoing) relationship</p> <p>-- territory including the employer's territory, so long as the total distance is reasonable and/or it contains a list of specific competitors that are forbidden</p> <p>-- scope defined by the actual business of the employer/entity</p>
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	(4) Any restriction that operates during the term of an employment relationship, agency relationship, independent contractor relationship, partnership, franchise, distributorship, license, ownership of a stake in a business entity, or other ongoing business relationship shall not be considered unreasonable because it lacks any specific limitation upon scope of activity, duration, or geographic area as long as it promotes or protects the purpose or subject matter of the agreement or relationship or deters any potential conflict of interest.	But no defense that entire scope or entire geographic area was not violated.
	§ 13-8-57 [Presumptions of Reasonableness as to Time]	
<i>(presumptions not previously used)</i>	(a) In determining the reasonableness in time of a restrictive covenant sought to be enforced after a term of employment, a court shall apply the rebuttable presumptions provided in this Code section.	Establishes time periods presumed reasonable, for various categories of covenants.
A two-year duration is often considered reasonable even under the strict scrutiny for employment covenants not to compete. <i>Habif, Arogeti & Wynne v. Baggett</i> , 231 Ga. App. 289, 292 (1998).	(b) In the case of a restrictive covenant sought to be enforced against a former employee and not associated with the sale or ownership of all or a material part of: (1) The assets of a business, professional practice, or other commercial enterprise; (2) The shares of a corporation; (3) A partnership interest; (4) A limited liability company membership; or	Establishes presumed maximum reasonable time period (2 years) for post-termination employment covenants (and defines employment agreement so that it can never include partnership or other similar business agreements).

	<p>(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,</p> <p>a court shall presume to be reasonable in time any restraint two years or less in duration and shall presume to be unreasonable in time any restraint more than two years in duration, measured from the date of the termination of the business relationship.</p>	
<p>We are dealing here not with an employment contract but with a partnership agreement. Although it does not appear that the appellate courts of this state have had occasion to clearly distinguish between the two types of agreements, there are obvious differences. In a partnership agreement such as the one here, as opposed to an employment agreement, the consideration flows equally among the contracting parties. ...The next distinction between employment agreements and partnership agreements is that it is generally true in the employer/employee relationship that the employee goes into a transaction such as this at a great bargaining disadvantage. Such would not be expected to be the case in a professional partnership arrangement, and it certainly was not the case here. ...Since the employee who agrees to the covenant may have done so from an inferior bargaining position, and since the covenant may seriously impair his ability to earn a living, the courts have traditionally given greater scrutiny to restrictive covenants within employment contracts, as opposed to such covenants contained in business sales agreements. In the present case, however, neither unequal bargaining status nor impaired ability to earn a living is present. Seen in this context, the covenant does not appear to be unreasonable.</p> <p><i>Rash v. Toccoa Clinic Medical Assoc.</i>, 253 Ga. 322, 325-26 (1984) (holding 3-year noncompete reasonable)</p>	<p>(c) In the case of a restrictive covenant sought to be enforced against a current or former distributor, dealer, franchisee, lessee of real or personal property, or licensee of a trademark, trade dress, or service mark and not associated with the sale of all or a part of:</p> <p>(1) The assets of a business, professional practice, or other commercial enterprise;</p> <p>(2) The shares of a corporation;</p> <p>(3) A partnership interest;</p> <p>(4) A limited liability company membership; or</p> <p>(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,</p> <p>a court shall presume to be reasonable in time any restraint three years or less in duration and shall</p>	<p>Establishes presumed maximum reasonable time period (3 years) for other types of business relationships not associated with a sale.</p> <p>(Probably intended to apply only post-termination. <i>Cf.</i> § 13-8-56).</p>

	<p>presume to be unreasonable in time any restraint more than three years in duration, measured from the date of termination of the business relationship.</p>	
<p>The evidence supports the trial court's finding that the subject matter of the 1997 sales agreement was the sale of Attaway's waste business and his related obligations as the seller, while the subject matter of the 1998 agreement was Attaway's employment. ...</p> <p>Clearly, the noncompete covenant ancillary to the sale of the business relates to subject matter entirely different from that of the noncompete covenant ancillary to Attaway's employment as a manager with Republic. ...</p> <p>As the trial court recognized, Georgia law provides substantial protection and latitude to covenants ancillary to the sale of a business because the covenants are a significant part of the consideration for the purchase of the business. Accordingly, we find no error in the trial court's grant of Republic's motion for a permanent injunction to enforce the noncompete covenant in the 1997 sales agreement.</p> <p><i>Attaway v. Republic Services of Georgia, L.P.</i>, 253 Ga. App. 322, 323 (2002).</p>	<p>(d) In the case of a restrictive covenant sought to be enforced against the owner or seller of all or a material part of:</p> <ol style="list-style-type: none"> (1) The assets of a business, professional practice, or other commercial enterprise; (2) The shares of a corporation; (3) A partnership interest; (4) A limited liability company membership; or (5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise, <p>a court shall presume to be reasonable in time any restraint the longer of five years or less in duration or equal to the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection and shall presume to be unreasonable in time any restraint more than the longer of five years in duration or the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection, measured from the date of termination or disposition of</p>	<p>Establishes maximum presumed reasonable time period (5 years) for covenants associated with sale of a business.</p>

	such interest.	
	§ 13-8-58. [Enforcement]	
<p>Although Young was the owner of API, he chose to enter into the contracts in his individual capacity. API was not a party to the Restrictive Covenant, and thus, it was not entitled to pursue a claim for its breach. ... API nonetheless contends that it had standing to pursue the claim for breach of the Restrictive Covenant based upon a purported assignment of the contract rights made by Young to API. But, the Asset Purchase Agreement contained provisions that prohibited the assignment of assets and contract rights unless certain conditions were met.</p> <p><i>Accurate Printers, Inc. v. Stark</i>, 295 Ga. App. 172, 175 (2008)</p>	(a) A court shall not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract.	Eliminates privity-of-contract defense.
	(b) In determining the enforceability of a restrictive covenant, it is not a defense that the person seeking enforcement no longer continues in business in the scope of the prohibited activities that is the subject of the action to enforce the restrictive covenant if such discontinuance of business is the result of a violation of the restriction.	Eliminates defense that the plaintiff is no longer in the business, if the defendant's violation of the covenant is the reason why (i.e. put plaintiff out of business).
<p>A noncompete provision must balance "the employee's right to earn a living and his ability to determine with certainty the prohibited territory" with "the employer's interest in customer relationships created or furthered by</p>	<p>(c) A court shall enforce a restrictive covenant by any appropriate and effective remedy available at law or equity, including, but not limited to, temporary and permanent injunctions.</p> <p>(d) In determining the reasonableness of a restrictive covenant between an employer and an employee, as such</p>	<p>Requires enforcement by any "appropriate and effective remedy" including injunctions.</p> <p>Economic hardship may be considered in the case of enforcement of employee covenant.</p>

<p>its former employee on its behalf and its right to protect itself from the former employee's possible unfair appropriation of contacts developed while working for the employer.”</p> <p><i>Azzouz v. Prime Pediatrics, P.C.</i> 296 Ga. App. 602, 606 (2009).</p>	<p>terms are defined in subparagraphs (A) through (C) of paragraph (5) of Code Section § 13-8-51, a court may consider the economic hardship imposed upon an employee by enforcement of the covenant; provided, however, that this subsection shall not apply to contracts or agreements between or among those persons or entities listed in paragraphs (2) through (7) of subsection (a) of Code Section § 13-8-52.</p>	
	<p>§ 13-8-59. [Compliance with constitution, federal law]</p>	
	<p>Nothing in this article shall be construed or interpreted to allow or to make enforceable any restraint of trade or commerce that is otherwise illegal or unenforceable under the laws of the United States or under the Constitution of this state or of the United States.</p>	<p>Rule of construction to avoid unconstitutionality and conflict with federal (antitrust) law.</p>
<p>Quite plainly, this Act [§ 13-8-2.1] is an effort by the General Assembly which would breathe life into contracts otherwise plainly void as being impermissible under the cited constitutional provision. Further, under the express terms of subparagraph (g), a court seemingly would be directed by the General Assembly to enforce contracts in which the restraint is “against the policy of the law,” provided it is not so much against that “policy of the law” as to be “unconscionable.”</p> <p>Because the General Assembly is expressly prohibited by our Constitution from authorizing any contract that is violative of the constitutional provision, this purported Act of authorization is “unlawful and void.”</p> <p><i>Jackson & Coker, Inc. v. Hart</i>, 261 Ga. 371, 372-73 (1991).</p>	<p>SECTION 4. [Effective date]</p> <p>This Act shall become effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date. If such amendment is not so ratified, then this Act shall stand automatically repealed.</p>	<p>Effective only upon ratification of constitutional amendment in 2010; automatically repealed otherwise.</p> <p>Applies only to contracts entered into on or after effective date.</p>

